

1954

Salt Lake City v. Utah Lake Farmers Association : Brief of Appellants

Utah Supreme Court

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In the
Supreme Court of the State of Utah

SALT LAKE CITY, a municipal corporation of the State of Utah, et al.,
Plaintiffs and Appellants,

vs.

UTAH LAKE FARMERS ASSOCIATION, an unincorporated association, et al.,
Defendants and Respondents.

Case No.
8078

BRIEF OF APPELLANTS

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In the
Supreme Court of the State of Utah

SALT LAKE CITY, a municipal corporation of the State of Utah, UTAH AND SALT LAKE CANAL COMPANY, a corporation, SOUTH JORDAN CANAL COMPANY, a corporation, NORTH JORDAN IRRIGATION COMPANY, a corporation, and the EAST JORDAN IRRIGATION COMPANY, a corporation,

Plaintiffs and Appellants,

vs.

UTAH LAKE FARMERS ASSOCIATION, an unincorporated association, and ALFRED J. MADSEN, KENNETH B. OLSEN, PHILLIP W. GREEN, KARL ALLEMAN and KENNETH CONDIE, as officers, directors and members of said association; PROVO CITY, a municipal corporation of the State of Utah, ALFRED J. MADSEN, KENNETH B. OLSEN, PHILLIP W. GREEN, KARL ALLEMAN, KENNETH CONDIE, CHARLES MADSEN, B. H. MENDENHALL, BOYD HOLMSTEAD, WALTER HOLDAWAY, MILTON HOLDAWAY, DAVID R. LeBARRON, ROYAL J. MURDOCK, H. LeROY GAMMON, GEORGE ELMER HUFF, LEW DIAMOND, PAUL TAYLOR, STIRLING DURRANT, EARL STUBBS and JOHN B. MONEY, individually, and as representatives of a class to which they belong; UTAH LAKE AND JORDAN DAM COMMISSION, and W. A. KNIGHT, H. B. WOODBURY, CHARLES MADSEN, B. H. MENDENHALL, and WARD C. HOLBROOK, the members of said commission,

Defendants and Respondents.

BRIEF OF APPELLANTS

STATEMENT OF FACTS

The points presented by this appeal involve one of the major water systems in the State of Utah, comprising Utah Lake, Jordan River and facilities for the diversion of water from said lake and river into canals from which it is distributed for irrigation, domestic, industrial and other beneficial uses.

Geography

Utah Lake is a natural body of water lying in western Utah County and having a surface area, at compromise elevation (a point later defined herein) of approximately 93,000 acres. This lake is formed by the inflow of streams such as the Provo River, the Spanish Fork River and several smaller streams draining into it from the Wasatch Mountains to the east. The water is impounded in the lake because of the restricted outlet. The Jordan River at the north end of the lake is the only natural outlet of the lake and carries the overflow of Utah Lake down its channel to the Great Salt Lake. To the north of Utah Lake and adjacent to the Jordan River, there lies sixty or seventy thousand acres of fertile lands which require irrigation in order to become agriculturally productive. Salt Lake City lies north of Utah Lake and easterly from the Jordan River and requires water for culinary, domestic and industrial purposes.

Development of Rights to Use of Waters of Utah Lake and Jordan River

During the period between 1872 and 1883, each of the plaintiffs constructed a canal from the Jordan River at

points near the boundary line between Salt Lake County and Utah County at an aggregate cost of \$805,000.00 (R. 57-60). In 1872, Salt Lake County constructed a dam in the Jordan River, near the boundary line between Salt Lake County and Utah County for the purpose of diverting the water of Jordan River from its natural channel and causing the same to flow through the said several canals of plaintiffs for the uses and purposes aforesaid. This dam has been referred to as the "Old Dam" or "Turner Dam." Subsequent to its erection, title to said dam was transferred to plaintiffs. (R. 60-61).

The capacity of said several canals and the quantities of water to which plaintiffs were adjudged the right to use, subject to prior rights, by decree entered in the District Court of Salt Lake County (commonly known as the "Morse Decree"), are as follows:

Utah & Salt Lake Canal Company	246 second feet
East Jordan Irrigation Co.	170 second feet
Salt Lake City	150 second feet
South Jordan Canal Co.	142 second feet
North Jordan Canal Co.	120 second feet
<hr/>	
Total	828 second feet

During the years 1889 and 1890, plaintiffs constructed above the "Old Dam," a dam which was commonly known as the "Indian Ford Dam," or "New Dam." Except for the sill of the Indian Ford Dam, neither it nor the Old Dam are now in existence. The location of said canals and diversion and measuring devices is shown on a map of the Engineering Department of Salt Lake City (R. 216).

Utah Lake fluctuates in its elevation and thereby in its water productivity from year to year and from time to time within each year, dependent upon the precipitation falling upon the watersheds tributary to the lake (R. 216). In order to conserve and equalize the outflow of Utah Lake, impounding dams were installed in the channel of Jordan River to retard the outflow from the lake during the non-irrigation season and thereby to convert Utah Lake from a natural reservoir to a natural and artificial reservoir. Just to the extent that the natural outflow of the lake was retarded, the level of the lake was artificially raised and the lands along the shore of the lake were to that extent inundated. This situation inevitably resulted in a controversy between those who were impounding the water and the owners of the lands along the shores of the lake. The impounding of the waters of Utah Lake prevented their wasting into Great Salt Lake during the nonirrigation season and thereby provided a more adequate water supply for the valuable agricultural lands in Salt Lake County, but this, in turn, inundated to some extent agricultural lands in Utah County. This provoked a real controversy involving very substantial rights.

In 1884, the controversy was referred to arbitrators, who were prominent citizens of Salt Lake and Utah Counties. The substance of the decision arrived at by the arbitrators was incorporated in an agreement which was entered into in the year 1885 between plaintiffs and owners of lands bordering Utah Lake, which agreement has been known through the years as "Compromise Agreement" (R. 12-53).

Compromise Agreement

Compromise Agreement which is pleaded in full and attached to plaintiffs' complaint has never been modified and is still in full force and effect (R. 91, 117). Said controversy, arising from the plaintiffs' holding back and storing the waters of Utah Lake and thereby flooding lands lying adjacent thereto, was fully settled by Compromise Agreement. Under its terms, the plaintiffs paid an agreed and substantial sum to the landowners in Utah County, in consideration of which said landowners granted to plaintiffs a perpetual easement to flood the lands of said landowners, free from liability or damage, to the extent that the storage of water in said lake raised the level thereof to a point known as "Compromise Point." Compromise Agreement also provides for the election annually by the parties thereto of a board of five persons known as the "Utah Lake Commission," under whose directions the rights granted by said agreement should be exercised by plaintiffs. For such purpose, said agreement constitutes said board the agent of the parties thereto. (Said commission is also known as "Utah Lake and Jordan Dam Commission.")

The Colladge Case

Subsequent to the execution of Compromise Agreement, a controversy developed involving the interpretation of the terms of the agreement and the rights of the parties thereunder. On or about March 31, 1894, plaintiffs commenced an action in the District Court for the First Judicial District, Utah Territory, against the owners of land bordering Utah Lake to establish Compromise Point as describ-

ed in Compromise Agreement, and to have determined the extent to which the easement granted thereunder permitted the flooding of lands bordering Utah Lake by the holding back and impounding of the waters of said lake. A judgment and Decree was entered in said action on January 3, 1896, which was reviewed by this court. *Salt Lake City v. Colladge*, 13 Utah 522, 45 P. 891. On November 5, 1896, Judge A. C. Hatch, of said district court, made and entered corrected Findings of Fact and Judgment and Decree in accordance with the Supreme Court's decision (R. 8, 9, 54-78, 86, 111).

Compromise Point is established by the decree entered in the Colladge Case as follows:

“It is therefore Ordered, Adjudged and Decreed, that the plaintiffs have the right to maintain the waters of Utah Lake at an elevation four feet six inches (4 ft. 6 in.) below the top of the stone monument near the head of Jordan River which was established by the Utah Lake Commission in 1885, said elevation being the point referred to in the contract set out in the findings of fact herein as ‘three feet three and one-half inches (3 ft. 3½ in.) above the point heretofore established and recognized as low water mark in said lake.’

“It is further Ordered, Adjudged and Decreed that a survey shall be made and a permanent monument shall hereafter be established and maintained at the expense of the plaintiffs in said Utah Lake at a point to be hereafter agreed upon by the parties hereto or fixed by the court, between a point one mile north of Provo River and a point five miles south of the mouth of said river, where it will be least subject to temporary fluctuations of the height of the water by winds or the influx of Spanish Fork

and Provo Rivers, to perpetuate said agreed elevation, and that said monument when so established, shall be maintained as the controlling evidence of the elevation at which the water of said lake is authorized to be maintained by the plaintiffs under said contract" (R. 76).

Pursuant to the above provision of said decree, a survey was made by A. F. Doremus and Charles DeMoisey for the purpose of establishing a permanent monument to perpetuate Compromise Point. Such monument was erected on an island in said lake known as Snail Island. Some years prior to the present action, the Snail Island Monument was destroyed as a result of erosion, washing of the waves, ice and other causes (R. 9, 86, 112).

With respect to the Utah Lake Commission created by Compromise Agreement, Justice Bartch, speaking for the Court in the Colladge Case, said:

"For the purpose of carrying the agreement into effect, provision was made for the appointment of a commission, who were constituted the agents of both parties to the contract, and, among other things, were empowered to determine and direct when and to what extent obstructions might be placed into the waterway of the dam, not to exceed the highest elevation specified in the contract."

The Court then proceeds to make a very significant construction of Compromise Agreement as to the purpose, status and powers of the Utah Lake Commission. Inter alia the court holds:

"The remaining material question in this case is whether the Utah Lake commissioners have auth-

ority, under the contract, to permit the appellants to place additional obstructions in the dam, between October 1st, in any year, and March 15th following, if such obstructions have been ordered out and removed after the 1st day of October. The trial court decided this question in the negative, as appears from the clause of the decree which reads as follows: 'If the said commissioners order the removal of the planks or other obstructions after the 1st day of October in any year, the plaintiffs shall not have leave to replace the same until the 15th day of March of the following year, nor at that time, unless the commissioners shall so decide.' The appellants claim that this is the result of an erroneous construction of the contract, and is not in harmony with the intent of the parties to it, and that the intention of the parties in creating the commission was to give it all the power necessary to enable it to carry the contract into effect according to its true intent and meaning. The commission was created 'for the purpose of better carrying' the contract into effect, and the contract, so far as material here, provides as follows: 'The said persons shall constitute a board, and are hereby empowered, as the legally constituted agents of the parties hereto, to determine and direct when and to what extent obstructions may be placed in the said waterway of the dam for the purpose of storing the lake with water for future use, not to exceed the highest elevation hereinbefore specified; provided, that if in any year, on or after the 15th day of March, it shall be ascertained by said board that the fall of snow during the past winter has been light, and if the said board are of the opinion that the water of Utah Lake will probably not rise to the highest level hereinbefore mentioned, then the said board shall permit the said parties of the second part to raise said dam to a height to be fixed by said board, which

shall cause the water of said lake to rise to said level; and, if it shall be ascertained by experience and observation that the said parties of the second part can obtain all the water necessary for irrigation purposes by keeping the waterway of the dam open until the waters of Utah Lake shall have receded below the highest level mentioned, then the said board shall require the waterway to be kept open until the water recedes to such level as the board shall deem sufficient to supply the said parties of the second part with water; and provided, further, that when at any time in each year, to be fixed by said board, the high water of Utah Lake shall have receded to the highest elevation above herein specified, the parties of the second part shall have the right, without hindrance from any person or persons, to cause the waters of said Utah Lake to be held back by regulating said dam not to exceed the elevation above mentioned, and use the said water as they may desire until such date, on or after the 1st day of October, as said board shall decide, at which date the said parties of the second part shall open the entire waterway of said dam (excepting the uprights) down to the sill or base thereof, and permit the said waters to run free.' Under this provision of the contract, it is insisted by the respondents that, if the additional obstructions are ordered removed by the commission after the 1st day of October in any year, they cannot be replaced until after the 15th day of March next following. This would imply that, if they were not ordered removed, they might remain in the dam during the entire winter. We do not think such a construction is warranted by the language employed, nor by the purpose and object for which the commission was created. While the plaintiffs are not permitted to replace the obstructions, of their own motion, after they have been ordered out, still the

commission may order them replaced at any time when the circumstances and condition of the lake warrant the obstructing of the flow of the water, so as to comply with the terms of the contract. The purpose and duty of the commission are to watch the condition of the lake, and guard the interests of both parties to the contract. In the absence of express words to that effect, we do not feel warranted to adopt a construction which would empower the commission to permit the planks to remain in the dam from October 1st to March 15th, but prohibit them from replacing them before March 15th, if, for any purpose, they should order them to be removed after the 1st of October; nor, after a careful consideration of the entire contract, are we able to ascertain any good reason why such a construction should be adopted; nor is there anything to indicate that such was the intention of the parties at the time of making the contract. We conclude that the appellants' contention as to this point must also be sustained, and that the finding of facts and decree, in relation to this question, must be modified so as to authorize the commission to replace additional obstructions in the waterway of the dam before the 15th day of March in any year, even if they were taken out after the 1st day of October."

The "Morse Decree"

Subsequent to the decision in the Colladge Case, a controversy arose involving the water rights of the users in Salt Lake County of the water of Utah Lake and Jordan River. This resulted in the filing of three actions in the District Court of Salt Lake County, the parties to which were the numerous claimants to the use of said waters. The three causes were consolidated and tried together by Honor-

able C. W. Morse, Judge of said court, who on July 15, 1901, made and entered the Judgment and Decree of the court and thereafter and in connection therewith made and entered certain supplemental decrees and orders. Said decrees and orders, which are commonly referred to as the "Morse Decree," have become historic in the settlement and administration of the water rights involved. For the convenience of this court in referring thereto, we submit herewith copies of said decrees and orders. In the year 1902, the Morse Decree was reviewed and affirmed by this court. *Salt Lake City, et al. v. Salt Lake City Water and Electric Power Co. et al.*, 24 Utah 249, 67 P. 672.

The District Court of Salt Lake County retained original jurisdiction of said cause, the subject matter thereof, and the parties thereto for the purpose of all necessary supplementary orders and decrees which might be required to make effectual the rights awarded and preserved by said decree. For such purpose, the court appointed a commissioner at a certain monthly salary, "to superintend and direct the measurement and division of all the water, distributed by this Decree in accordance therewith; to direct, supervise and inspect all mains and appliances for the diversion, conveyance, and use of the same, and to report from time to time to the court, any violation of the provisions of this Decree." Since the entry of the Morse Decree, the diversion and distribution of the waters of Utah Lake and Jordan River have been continuously under the exclusive control of a commissioner appointed by the District Court of Salt Lake County or a water commissioner appointed by the State Engineer of the State of Utah as provided by Chapter 5, Title 73, Utah Code Annotated 1953.

It is obvious that the fluctuating natural flow of Jordan River was not adequate each year to satisfy the requirements of the plaintiffs. Plaintiffs, in order to make available a regular and dependable supply of water, undertook, prior to 1906, to, and did, install, a number of pumps at the mouth of the Jordan River, designed to deliver into the channel of the Jordan River a quantity of water greatly in excess of the amount that would flow by gravity into the channel of the river when the level of the lake was at or below Compromise Point. The effect of the pumping of such excess quantities of water was to lower the level of Utah Lake; therefore, the level of the lake has at all times since 1907, been lower than it would have been except for said pumping.

*Diversion Works and Measuring Devices
at Jordan Narrows*

The Morse Decree, among other things, directed that the parties thereto, under the direction and supervision of a commissioner appointed by the court, construct and maintain proper facilities for measuring and distributing the waters awarded under said decree. Subsequently, upon a hearing involving the foregoing provision of said decree, Judge Morse of the District Court of Salt Lake County appointed a Board of Engineers, which included the court commissioner, to examine and make recommendations as to what facilities were necessary to distribute the waters of said lake and river in accordance with said decree. Such recommendations were duly made, and the court, under its retained jurisdiction, ordered, "That certain controlling,

regulating and measuring devices shall be placed in the Jordan River, in order to properly regulate the flow of water in said river, so that the various parties may draw therefrom with substantial accuracy, the quantity of water to which they are respectively entitled, under the original decree entered in this cause." Said order was entered by the District Court of Salt Lake County on February 13, 1914, (R. 158-163) ; and it was reviewed and affirmed by this court. *Salt Lake City v. Utah & Salt Lake Canal Company*, 43 Utah 591, 137 P. 638. Such devices were constructed in 1914 in the Jordan River at the Jordan Narrows as ordered by said court and in accordance with the plans and specifications recommended by the commissioner and approved by the court.

Defendants claim under their counterclaims that said facilities at the Jordan Narrows have been maintained and operated by plaintiffs in violation of Compromise Agreement (R. 102-103, 126-127). It will be remembered, however, that the construction of these installations was ordered by the court and, since their installation to the present time, they have been continuously under the control of and operated by either a commissioner appointed by the court or a water commissioner appointed by the state engineer. Such operations have been carried on for nearly forty years with full knowledge of and without protest by defendants or the Utah Lake Commission ; nor has any action been instituted by defendants to prevent the use or affect the operation of said facilities, until the filing of their counterclaims in the present suit. Plaintiffs have pleaded as defenses to said counterclaims that the defendants are now estopped and

barred by laches to contend that these facilities in any way invade their rights (R. 172-175, 183-185). Upon motion of defendants, however, the trial court has stricken the defenses of estoppel and laches (R. 205).

*General Adjudication of Water Rights in Utah Lake,
Jordan River and Their Tributaries*

In the year 1936, Salt Lake City, et al., commenced an action in the District Court of Salt Lake County against approximately 2,430 defendants to quiet title to the use of the waters of Utah Lake, Jordan River and their tributaries. As a result of the proceedings had in that case, the Supreme Court held that the trial court must proceed with a general adjudication of all the rights to the use of the waters of said lake and river, and their tributaries, in the manner provided by Chapter 4, Title 100, R. S. U. 1933, and amendments thereto, (Chapter 4, Title 73, Utah Code Annotated 1953). *Salt Lake City v. Anderson*, 106, Utah 350, 148 P. (2d) 346. The case was remanded to the district for such purpose and on September 1, 1944, said court entered its order decreeing a statutory adjudication (R. 150-151). Said action is still pending.

On February 9, 1945, the District Court of Salt Lake County, ordered that the state engineer be authorized to appoint water commissioners as provided by Sec. 100-5-1, Utah Code Annotated 1943, (Sec. 73-5-1, Utah Code Annotated 1953), to distribute all waters of Utah Lake, Jordan River and their tributaries in accordance with existing decrees, pending said action for a general adjudication (R. 152-154).

There is on file and of record in the office of the state engineer annual reports filed by the water commissioner so appointed by the state engineer for the administration and distribution of the waters of Utah Lake and Jordan River. These are public records of which the courts take judicial notice. They set forth in detail said commissioner's administration of the waters of Utah Lake and Jordan River and his operations in effecting a distribution of said waters to the parties entitled to the use thereof under existing decrees.

Outline of Issues in Present Case

Utah Lake, Jordan River and the diversion works for distributing the waters thereof to the users entitled thereto constitute one complete and entire water system. *Salt Lake City v. Utah and Salt Lake Canal Co.* (supra). The administration of the waters of said system are dependent on the storage rights provided for under Compromise Agreement. The existing decrees evidencing the rights of the many users of said waters are conditioned upon such storage rights. The rights granted under Compromise Agreement as defined and preserved by the Colladge Case are in turn dependent upon the location of Compromise Point.

For sometime prior to the commencement of the present action,, there has existed a controversy as to the true location of Compromise Point as established by the decree entered in the Colladge Case. The uncertainty as to the location of Compromise Point arose from the destruction of the Snail Island Monument which was erected pursuant to said decree as the controlling evidence of Compromise Point, and from the dislocation of the stone monument

designated in said decree as being near the head of the Jordan River. This question as to the true elevation of compromise level prompted the state engineer to make a survey in the year 1946, for the purpose of re-establishing Compromise Point. (Report of Water Commissioner on Utah Lake and Jordan River Distribution for the Year 1946, Pages 56-61). The correct location of Compromise Point must be known to the state engineer in order that he may discharge his duties in the administration and distribution of the waters of Utah Lake and Jordan River during the pendency of the statutory adjudication.

On September 7, 1951, plaintiffs filed the present action to re-establish Compromise Point as judicially fixed and determined under the Colladge Case. This is the sole purpose of this action and it merely invokes the retained equitable jurisdiction of the court which originally rendered the decree in the Colladge Case, to effectuate the rights evidenced and preserved thereby. Defendants admit that a controversy has arisen making it necessary that said court declare and determine the true elevation of Compromise Point, and join with plaintiffs in seeking such relief (R. 87, 106, 113, 129). The granting of such relief as sought by all parties to this action could not in anyway change, modify or affect the rights of any party as established under the Colladge Case, or otherwise.

Defendants have set up alleged counterclaims in said proceedings under which they seek injunctive relief and damages (R. 100-108, 124-130). Defendants also filed affidavits, petitions and motions for an order to show cause why a preliminary injunction should not be issued against

plaintiffs (R. 131-138). The court entered such order to show cause on December 6, 1952 (R. 139-140). Plaintiffs filed answers to said affidavits and petitions for preliminary injunction (R. 141-168). This matter is still pending. Plaintiffs also filed motions to strike certain matters and defenses from said counterclaims and to dismiss the same (R. 192-197). Said motions were denied, except plaintiffs' motion to strike the third and fourth defenses contained in the answer of said defendants (R. 198-199). The plaintiffs filed replies to said counterclaims (R. 169-188). Upon motion of defendants the trial court ordered stricken certain defenses from said replies and certain portions from plaintiffs' answer to defendants' affidavit and petition for preliminary injunction (R. 204-205). Upon plaintiffs' petition, this court granted an interlocutory appeal from said last-mentioned orders (R. 217). The additional pertinent matters contained in the foregoing pleadings are specifically set forth under our argument.

STATEMENT OF POINTS

1. The counterclaims should be dismissed because the undisputed facts established by the record in this case and of which the court takes judicial notice, show that said counterclaims state no claim and present no issue upon which relief can be granted against plaintiffs.

2. The trial court erred in striking from plaintiffs' replies the third and fourth defenses contained therein.

3. The trial court erred in striking from plaintiffs' replies the fifth defense contained therein.

4. The trial court erred in striking from plaintiffs' replies the tenth defense to the counterclaim of the defendant, Provo City, and the eleventh defense to the counterclaim of defendants, Utah Lake Farmers Association, et al.

5. The trial court erred in striking from plaintiffs' reply to the counterclaim of the defendant, Utah Lake Farmers Association, et al., the twelfth defense contained therein.

6. The trial court erred in striking from plaintiffs' replies the eleventh defense to the counterclaim of the defendant, Provo City, and the thirteenth defense to the counterclaim of defendants, Utah Lake Farmers Association, et al.

7. The trial court erred in striking from plaintiffs' replies the twelfth defense to the counterclaim of the defendant, Provo City, and the fourteenth defense to the counterclaim of the defendants, Utah Lake Farmers Association, et al.

8. The trial court erred in striking certain portions from plaintiffs' answer to defendants' affidavit for preliminary injunction.

ARGUMENT

POINT NO. 1

THE COUNTERCLAIMS SHOULD BE DISMISSED BECAUSE THE UNDISPUTED FACTS ESTABLISHED BY THE RECORD IN

THIS CASE AND OF WHICH THE COURT TAKES JUDICIAL NOTICE, SHOW THAT SAID COUNTERCLAIMS STATE NO CLAIM AND PRESENT NO ISSUE UPON WHICH RELIEF CAN BE GRANTED AGAINST PLAINTIFFS.

Under their counterclaims, defendants allege that plaintiffs have violated Compromise Agreement as follows:

“15. That during previous years, to increase carryover water, and after October 1st, 1951 and during 1952 to date, the plaintiffs without right or authority and in violation of the terms of said Compromise Agreement, have caused planks and other obstructions to be placed and maintained in their dam at the Jordan Narrows and have maintained said dam without the openings required by said Compromise Agreement and that even while the level of Utah Lake has been far above Compromise Point during the present year, and with unprecedented runoffs into Utah Lake, anticipated and experienced, the plaintiffs have, without authority or right, continued to so obstruct the said Jordan River, thereby unreasonably and wrongfully retarding the flow of water from Utah Lake and causing large areas of valuable land surrounding Utah Lake belonging to defendants and those similarly situated to be, and remain, inundated to the great and irreparable damage of the owners thereof, including these defendants, and these defendants allege upon information and belief that plaintiffs intend, and will continue, to so wrongfully maintain said obstructions in said river to the irreparable damage of these defendants and those similarly situated unless restrained and enjoined by this court” (R. 102-103, 126-127).

The claim hereinabove quoted is directed at the facilities which were installed in the Jordan River at the Jordan Narrows under an order of the District Court of Salt Lake County entered in the year 1914, for the purpose of effecting a distribution of the waters of said lake and river in accordance with existing decrees (R. 144-149). To avoid the obvious impact of the defenses of estoppel, laches and the statute of limitations, defendants in support of their motions to strike state the nature of their claim as follows:

“Despite these and similar allegations, the plaintiffs’ purported third defense does not state a defense by way of estoppel, or any other basis. *We are not complaining so much about the structure at Jordan Narrows itself as the way it has been handled and operated, particularly during 1952.* The damages prayed for are damages accruing in 1953 and future irreplaceable damage that is threatened (R. 216). (Emphasis Ours).

“Plaintiffs throughout this proceeding have emphasized the fact that up until 1952 the lake had not been at compromise for many years. *We primarily are seeking in the counterclaim to recover damages for 1952 and to prevent the recurrence of damages by the unlawful flowage of our lands in future years*” (R. 216). (Emphasis Ours.)

The simple truth of the matter is that plaintiffs have not “handled and operated” the installations at the Jordan Narrows, either in 1952 or at any other time since their construction in 1914. For many years following the construction of these facilities, they were continuously under the control and management of a commissioner appointed by the District Court of Salt Lake County. In the year 1925,

the commissioner appointed by said court was superseded by a water commissioner appointed by the state engineer to administer and distribute the waters of Utah Lake and Jordan River, as provided by Chapter 5, Title 73, Utah Code Annotated 1953. Since the original appointment of said water commissioner, the state engineer, through his duly appointed commissioners, has continuously distributed the waters of said lake and river and operated the controlling works and measuring devices installed for such purpose. Detailed reports, fully covering the state engineer's administration of Utah Lake and Jordan River, are on file and of record in his office. This court takes judicial notice of these records. Sec. 78-25-1, Utah Code Annotated 1953. *American Fork Irr. Co. v. Linke*, 239 P. (2d) 188.

In *Minersville Reservoir & Irr. Co. v. Rocky Ford Irr. Co.*, 90 Utah 283, 61 P. (2d) 605, this court held that the purpose and functions of a water commissioner appointed by the state engineer are:

“The primary purpose of a water commissioner is to assist the court in carrying out its decrees. His duties are to aid the courts and the state engineer in the distribution to the various water users of the quantity of water to which each is entitled. The commissioner is an arm of the court and the state engineer in enforcing and protecting the various water users in their rights. He is appointed by the state engineer upon recommendation of the interested water users. The state engineer may remove him for cause upon an application of a water user and a hearing had thereon. The same power inheres in the court under which he serves. R. S. 1933, 100-5-1.”

Water commissioners appointed by the state engineer have exclusive control of the distribution of the waters which come under their administration. In the exercise of such control, they must abide by existing decrees. *Caldwell v. Erickson*, 61 Utah 259, 213 P. 182. The commissioner appointed to distribute the waters of Utah Lake and Jordan River is required to make such distribution in accordance with the "Morse Decree" and in conformity with the storage rights adjudicated and defined by the decree entered in the Colladge Case. This requires that he recognize the functions and action of the Utah Lake Commission, an agency created by Compromise Agreement to carry the same into effect and guard the respective interests of the parties thereunder. It is significant that defendants do not claim that the Utah Lake Commission has failed or neglected to discharge its duties under said agreement.

Although an action for damages cannot be maintained against a water commissioner for alleged wrongs committed in the discharge of his duties (*Wilkinson v. State*, 42 Utah 483, 134 P. 626), any person aggrieved by such wrongs has a plain, speedy and adequate remedy to redress an invasion of his rights. *Salt Lake City v. Anderson* (supra); *Minersville Reservoir & Irr. Co. v. Rocky Ford Irr. Co.* (supra). If the water commissioner appointed by the state engineer to administer the waters of Utah Lake and Jordan River has violated Compromise Agreement, the defendants, the Utah Lake Commission, or any other person affected thereby, had recourse to the court having jurisdiction to restrain and prohibit such violation by injunctive orders. *Salt Lake City v. Anderson* (supra).

It is indisputable that neither the defendants nor the Utah Lake Commission have ever invoked the jurisdiction of any court to obtain relief against the state engineer or his water commissioner because of the alleged wrongs complained of under the counterclaims. Instead, defendants demand damages and injunctive relief against plaintiffs for such alleged wrongs which, under the record presented in this case, were not and could not have been committed by plaintiffs.

The foregoing disposes of what plaintiffs characterize as the primary relief sought under their counterclaims. As a further dereliction in the administration of the waters of Utah Lake and Jordan River, however, said counterclaims charge that the flowage rights granted under Compromise Agreement have been exceeded because part of the water held back and inundating the lands adjacent to said lake has reached the same by "return flow, seepage and drainage" of water brought into this area from foreign watersheds through reclamation projects; and also because wells drilled since Compromise Agreement have contributed additional water to said lake (R. 100-102, 125-126). It is not contended that plaintiffs constructed the reclamation projects or drilled the wells which are alleged to be responsible for such additional waters reaching Utah Lake.

Defendants claim that the easement granted by Compromise Agreement is limited to the flowage of their lands by water of said lake having its source "from the watersheds directly contributing to Utah Lake and from precipitation" (R. 100-101, 125). Such a limitation of the flowage rights granted under said agreement must be written

therein by the court from parol evidence as it is neither expressly nor impliedly stated therein. To the contrary, said agreement expressly grants to plaintiffs:

“Also the right free from interference or liability for damage to flow the lands of said parties of the first part or either of them to the extent which the dam above described may cause the same to be *flowed by the waters of the said Jordan River, Utah Lake or otherwise*” (R. 15-16). (Emphasis Ours).

Defendants would have the court impose such limitation and condition upon the easement granted under Compromise Agreement, contrary to its express terms, on the basis of a speculation as to what was “contemplated” by the original parties to said agreement (R. 100-102, 125-126). To support such a claim, the court would be required to find that the parties to said agreement could not foresee the need for the development of additional sources of water to supply the domestic, irrigation and other requirements of a growing population in an arid state. Such a proposition is contrary to common knowledge.

The reasonable assumption is that both parties to Compromise Agreement contemplated that, as the population of Utah and Salt Lake Counties grew, additional sources of water would be required and that Compromise Point was in fact a compromise as to the elevation to which the waters of the Utah Lake could be impounded, regardless of the source of such waters.

Aside from the speculation as to what the parties may or may not have contemplated, Compromise Agreement clearly and specifically defines the rights granted to plain-

tiffs thereunder and the terms and conditions thereof have been fully construed under the Colladge Case. Said agreement contains no such condition or limitation as now contended for by defendants. In 17 Am. Jur., Section 97, page 996, the author states: "If a grant is specific in its terms, it is decisive of the limits of the easement." In *Big Cottonwood Tanner Ditch Co. v. Moyle*, 109 Utah 213, 174 P. (2d) 148, this court said:

"The additional burdens which the servient owner may enjoy or for which he may receive damages are those burdens over and above those embraced within the framework of the easement itself—not for additional burdens which may result from the easement owner exercising his right to make changes in his method of using the easement which right was included in the easement as originally acquired."

Finally, defendants allege that the channel of the Jordan River has been adopted by plaintiffs as a private channel for the transportation of their irrigation water. Based on such allegation, defendants claim that it was plaintiffs' duty to remove obstructions in said river caused by landslides along the same, particularly those occurring in 1952 when unprecedented flood conditions prevailed in Utah and Salt Lake Counties. For such neglect of duty, defendants demand damages and a mandatory injunction.

The premise upon which defendants base said claim is contrary to the facts. It is a matter of common knowledge, of which the court takes judicial notice, that the Jordan River is not plaintiffs' private channel but a natural stream

which has been used for more than half a century by many persons other than plaintiffs to transport the waters of Utah Lake and Jordan River to which they are entitled to use under existing decrees. The right to convey appropriated waters in natural streams is subject to the control of the state engineer. Sec. 73-3-20, Utah Code Annotated 1953. The authority to remove any natural obstacle from any natural channels within a county is vested in the board of county commissioners of such county. Sec. 17-8-5, Utah Code Annotated 1953.

We respectfully submit that the counterclaims filed herein should be dismissed because the undisputed facts established by the record in this case and of which this court takes judicial notice, show that said counterclaims state no claim and cannot be amended to present any issue upon which relief can be granted against plaintiffs.

POINT NO. 2

THE TRIAL COURT ERRED IN STRIKING FROM PLAINTIFFS' REPLIES THE THIRD AND FOURTH DEFENSES CONTAINED THEREIN.

Said defenses are as follows:

"Third Defense

"Said defendants are not entitled to maintain said counterclaim and are estopped from so doing and are barred from any relief thereunder by reason of the facts, matters and circumstances hereinbelow set forth.

"Utah Lake, the Jordan River and the dams and appliances for impounding and diverting the waters from said lake and river into the canals leading from said river constitute one complete and entire irrigation system. Ever since the corrected decree entered in said Colladge case in the year 1896 to the time of filing said counterclaim said irrigation system, dams and appliances for the impounding, controlling, diverting, measuring and distributing the waters of Utah Lake and the Jordan River have been continuously maintained and operated with the knowledge, acquiescence and without objection of defendants or the Utah Lake and Jordan Dam Commission, which Commission is, and at all times herein mentioned has been, the duly constituted agent of all the parties to Compromise Agreement and their successors in interest, for the purpose of carrying said agreement into effect and guarding the interests of both parties to said agreement, with power and authority to direct when and to what extent plaintiffs may place and maintain obstructions in said river as provided by said agreement. Said Utah Lake and Jordan Dam Commission has not at any time herein mentioned found, determined or directed that plaintiffs have constructed, maintained or operated dams or obstructions in said river in violation of Compromise Agreement.

"The alleged dam in the Jordan Narrows referred to in paragraph 15 of said counterclaim and the only dam or obstruction maintained in the river at said place consist of certain controlling dams, appliances and devices, with weirs thereon and waterways therein, which were ordered and decreed to be constructed and maintained at said place under a supplemental decree entered by the District Court of Salt Lake County, State of Utah, on February 13, 1914, in consolidated cases No. 2861, No. 3449

and No. 3459, in which cause, under the original decree entered on July 19, 1901, the court adjudicated and quieted title to the water rights of numerous parties, including plaintiffs, in and to the waters of the Utah Lake and Jordan River. Said original decree was reviewed by the Supreme Court of Utah in 24 Utah 249, 67 P. 672, and said supplemental decree was reviewed by the Supreme Court of Utah in 43 Utah 591, 237 P. 638. Said works were ordered to be constructed, so that the various parties might draw therefrom with substantial accuracy the quantity of water to which they were respectively entitled under the original decree entered in said cause. Said works were constructed for such public use in the year 1914 in accordance with plans and specifications approved by said court and ever since the construction of said works, they have been operated and maintained as an integral part of said irrigation system under the control and regulation of the State Engineer of the State of Utah, as provided by Chapter 5, Title 73, Utah Code Annotated 1953, for the purpose of making available water for irrigating large areas of farm lands in Salt Lake County, and water for Salt Lake City whereby it obtains a substantial part of the culinary water required by the inhabitants of said city, and for other beneficial and public uses. Said works were constructed, as aforesaid, through the expenditure of large sums of money with the knowledge, acquiescence and without objection of the defendants, or the Utah Lake and Jordan Dam Commission, and ever since the construction of said works until the filing of said counterclaim, said works have been continuously maintained and operated, as now complained of by defendants, for the purposes and uses aforesaid, with the knowledge, acquiescence and without objection by defendants; and said works have been maintained and operated with the knowl-

edge, approval and without objection by said Utah Lake and Jordan Dam Commission, the duly constituted agent of all of the parties to Compromise Agreement" (R. 172-174, 183-185).

"Fourth Defense

"Said defendants are not entitled to maintain said counterclaim nor to any relief thereunder by reason of laches on the part of defendants as appears from the facts, matters and circumstances hereinabove set forth in plaintiffs' third defense, which facts, matters and circumstances are hereby adopted and incorporated herein as part of this defense" (R. 175, 185).

In view of Point No. 1, which calls for a dismissal of said counterclaims, Point No. 2 and the points hereinbelow argued, consequently supplement and substantiate Point No. 1. Our argument under Point No. 2 deals with both the third and fourth defenses because of the close relationship between the same.

It is significant that since the Colladge Case was decided in 1896 until the filing of said counterclaims, neither the parties to Compromise Agreement nor their successors in interest have contended in any legal proceedings that Compromise Agreement has been violated. The reason for this is apparent: The arbitrators and parties to Compromise Agreement, with practical foresight, provided against such controversies and litigation. This was accomplished, as pointed out in the Colladge Case:

"For the purpose of carrying the agreement into effect, provision was made for the appointment of a commission, who were constituted the agents

of both parties to the contract, and, among other things, were empowered to determine and direct when and to what extent obstructions might be placed into the waterway of the dam, not to exceed the highest elevation provided in the contract."

The state engineer's records disclose that over the course of years the level of Utah Lake has varied substantially from time to time according to the amount of precipitation on the watersheds draining into said lake. If Compromise Agreement had left it to the unilateral determination of plaintiffs as to when and to what extent obstructions could be placed in the Jordan River for impounding the waters of Utah Lake to compromise level, it is inevitable that controversies and litigation would have arisen over the exercise of the flowage rights granted to plaintiffs under said agreement.

It is not claimed by defendants that the facilities for controlling and diverting the waters of Utah Lake and Jordan River have been maintained or operated at anytime contrary to the directives or decisions of the Utah Lake Commission. The records of the state engineer's office disclose that there has been full cooperation between said commission and the water commissioner appointed by the state engineer to administer and distribute the waters of said lake and river.

This court has frequently recognized that Utah is an arid state, whose growth and progress depend upon the development and conservation of its water resources. It is firmly established by the statutes of this state and judicial decision that the facilities for the control and distribution

of the waters of Utah Lake and Jordan River are devoted to a public use. Section 73-1-6, Utah Code Annotated 1953. *Nash v. Clark*, 27 Utah 158, 75 P. 371, 198 U. S. 361. Injunctive relief has been consistently denied owners of property claiming that their property has been taken or damaged for public use without compensation, when such owners have been guilty of laches in asserting their claims. *Conaway v. Yolo Water & Power Co.*, 204 Cal. 125, 266 P. 944, 58 A. L. R. 674. That the defendants are estopped from any relief sought on account of the construction and maintenance of the diversion and distribution works at the Jordan Narrows apparently is conceded. Defendants state that they "are not complaining so much about the structure at Jordan Narrows as the way it has been handled and operated, particularly during 1952," and that they "primarily are seeking in the counterclaim to recover damages for 1952 and to prevent the recurrence of damages by the unlawful flowage of (their) lands in future years." It requires no citation of authorities for the proposition that plaintiffs cannot be held liable for the alleged wrongful manner of operating and handling diversion and distribution facilities which have been, and will continue to be, under the exclusive control of the state engineer as shown by the record in this case. This point is fully covered at the outset of our argument.

POINT NO. 3

THE TRIAL COURT ERRED IN STRIKING FROM PLAINTIFFS' REPLIES THE FIFTH DEFENSE CONTAINED THEREIN.

Said defense reads as follows:

"Fifth Defense

"Ever since 1885 to the present time, plaintiffs have openly, notoriously, continuously, adversely and under a claim of right against all the world, impounded the waters of Utah Lake and flowed the lands bordering said lake at such times and under such conditions as specified and set forth under Compromise Agreement" (R. 175, 185).

Defendants have alleged under their answers and counterclaims that the issues in this case may affect or involve persons or their successors in interest owning lands adjacent to Utah Lake, who were not parties to Compromise Agreement (R. 91, 92, 96, 117, 121). Plaintiffs' fifth defense is material as to such claim. Said defense pleads, as to any such parties, that plaintiffs have acquired prescriptive rights to flow their lands coextensive with the rights existing under Compromise Agreement. Said prescriptive rights were recognized by the findings of fact made in the Morse Decree in the year 1901 which state as follows:

"That ever since 1885, to the present time, the said city and said canal and irrigation companies have openly, notoriously, continuously and adversely against all the world, maintained and used said Utah Lake as a reservoir and said dam as an impounding dam, to hold back and store the waters

in the lake, when necessary to do so, in order to supply their needs during seasons of scarcity of water, and the said city and canal and irrigation companies have each contributed an equal share of all costs and expenses of all matters growing out of such joint enterprises.”

POINT NO. 4

THE TRIAL COURT ERRED IN STRIKING FROM PLAINTIFFS’ REPLIES THE TENTH DEFENSE TO THE COUNTERCLAIM OF THE DEFENDANT, PROVO CITY, AND THE ELEVENTH DEFENSE TO THE COUNTERCLAIM OF DEFENDANTS, UTAH LAKE FARMERS ASSOCIATION, ET AL.

Said tenth and eleventh defenses are as follows:

“The claims asserted by said defendant (defendants) in said counterclaim and the issues made by said counterclaim are such as are not subject to determination and adjudication in this action” (R. 176, 186).

This defense raises two questions: first, are the claims set forth in said counterclaim justiciable in this action and, second, is the counterclaim properly pleaded.

It must be borne in mind in considering these questions the basis of the action brought by the plaintiffs. Plaintiffs have asked no relief whatsoever against any of the defendants. The Compromise Agreement and the Hatch Decree interpreting said agreement, as defendants contend, cast upon these plaintiffs the burden of maintaining the

evidence fixing Compromise Point and thereby making effective the terms of the Compromise Agreement. It is immaterial how the monuments fixing Compromise Point were destroyed. The admitted fact is that they were destroyed and in order to determine the rights and the obligations of the respective parties to the Compromise Agreement, it is necessary that that point be re-established, if the decree of the court and the contract between the parties are to be made effective. We are not unmindful of the extent to which the rules as to pleading have been relaxed by the new rules of civil procedure; but we do not concede that there are no limitations as to the manner by which a plaintiff makes his claim against a defendant. In the complaint herein and in the answers filed by the defendants, the following facts are admitted:

1. The location and geography of Utah Lake and Jordan River.

2. The controversy between the landholders around Utah Lake and the water users in Salt Lake County prior to the execution of the Compromise Agreement.

3. The Compromise Agreement.

4. The Hatch Decree.

5. The fixing of Compromise Point under the Compromise Agreement and the Hatch Decree.

6. The destruction of the monuments evidencing Compromise Point.

7. The necessity that that point be restored.

8. The existence of the Utah Lake Commission and its functions.

To the complaint in this case, the defendants interpose their counterclaims, alleging in said counterclaims that the plaintiffs have stored water in Utah Lake above Compromise Point and contrary to the rights granted plaintiffs in the Compromise Agreement. It is obvious that no determination of this question could under any circumstances be made until the court had established the elevation of Compromise Point, which point fixed the storage rights of the plaintiffs herein. The rights of all of the parties to this agreement are fixed and limited, and dependent upon and contingent upon the height to which the waters of Utah Lake can be raised and the extent to which the lands of the defendants may be flooded.

Without in anyway waiving our contentions heretofore made that for the past fifty years the plaintiffs herein have in no way controlled the impounding of the waters in Utah Lake and the distribution of the waters from Utah Lake to the plaintiffs herein, plaintiffs contend that the counterclaims of the defendants are premature and should be stricken because of the fact that Compromise Point has not been fixed and determined by the court.

In the case of *Bach v. Quigan*, 5 F. R. D. 34, an action was brought under authority of the Securities and Exchange Act of 1934 for an alleged violation of subdivision (a) (4) of that section. The Securities and Exchange Act provides that if a dealer or broker offering for sale or purchase any security shall make any false or misleading statement with respect to any material facts, it shall be actionable. Plaintiffs sought to recover from defendant Quigan losses sustained through the purchase of certain stocks as a re-

sult of false statements made by Quigan. The statements were made by Quigan to one Traubner, a customer's man, and repeated by Traubner to plaintiff. Traubner is brought into the action by Quigan as a third party defendant. Quigan counterclaimed against Traubner. The second counterclaim alleges a conspiracy between plaintiff and Traubner to mulct Quigan. Quigan maintains that both of his counterclaims "sound in consiparcy and malicious abuse of process."

In this case Judge Moscovitz used the following language:

"This Court is in complete accord with the statement of defendant that the new Rules of Civil Procedure have displaced any archaic, obsolete and confusing rules which may previously have governed federal procedure and that they are designed for the swift and just disposition of legal disputes. However, it was never contemplated that any set of facts which might eventually constitute a 'claim upon which relief can be granted' should be interposed as a counterclaim to an action and it would not be an aid to the swift and just disposition of the matter to permit the issues to be confused by an uncertain claim, the substance of which is contingent upon the outcome of the principal action.

"Plaintiffs move to strike out the first and second counterclaims from defendants' answer on the ground that they 'fail to state a cause of action' against plaintiffs. As to the second counterclaim, plaintiffs seek the alternative relief of an order requiring that it be made more definite and certain.

"The counterclaim must be examined to determine if there are set forth therein facts which constitute a claim even under this liberal interpretation of pleading."

The counterclaim was stricken as premature. The above case is cited with approval in Volume 1, Barron & Holtzoff, Section 356, Page 643.

Barron & Holtzoff, Volume 1, Section 255, holds that a counterclaim must be so stated that, upon default, judgment might be entered in favor of the counterclaimants. Under this obviously applicable rule, it is interesting to examine the counterclaims of the defendants herein. The counterclaims allege that the defendants, or some of the defendants and other parties similarly situated own undescribed lands along the shores of Utah Lake, and that at sometime in the past the plaintiffs have stored water in Utah Lake contrary to the provisions of Compromise Agreement and have thereby flooded lands of the several defendants and damaged them in mass to the extent of \$750,000. Under established law, defendants are not entitled to sue under a class suit and under such holding it would be utterly impossible to determine how much of the claim of defendants is in behalf of people who cannot sue or who cannot be represented in a class suit and the defendants who are entitled to individually complain. Because of the insufficiency of the allegations of the counterclaim and the uncertainty of the claim which is asserted and because any claim of the defendants is contingent upon fixing of Compromise Point, said counterclaim is premature and should be dismissed.

Heretofore in this brief, it has been asserted, and we believe cannot be disputed, that at all times within the period complained of by the defendants the waters of Utah Lake and Jordan River have been administered either by

a duly appointed court commissioner or by the state engineer of the State of Utah and that said administration has further been subject to the direction of the Utah Lake and Jordan River Commission, the joint agent of the parties hereto. If the defendants herein have suffered any wrong or their rights have been in any degree invaded, that invasion has been due entirely to the conduct of those who distributed the waters and to their agent, the Utah Lake and Jordan River Commission.

In the case of *Fort Chartres and Ivy Landing Drainage and Levee Dist. No. 5 of Monroe and Randolph County, State of Illinois, v. Thompson, et al.*, 4 Federal Rules Decisions 369, the court held as is reflected in the first syllabus in said action:

“So-called counterclaims for interpleader which were neither counterclaims against plaintiff nor cross-claims against a codefendant, but were directed solely against persons who were not parties to the action, should be dismissed as not warranted by the Federal Rules. Federal Rules of Civil Procedure, rules 13(h), 14, 28 U. S. C. A. following section 723c.”

Since neither the state engineer, nor the Utah Lake Commission is made a party to defendants' counterclaims, said counterclaims should be dismissed.

In *Fidelity and Casualty Co. of New York v. Coffelt*, 11 Federal Rules Decisions 443, the court held that the counterclaim should be dismissed as premature since the relief sought was wholly dependent upon plaintiff's failure to prevail in the principal action.

In *Taylor v. E. M. Royle Corp.*, 264 P. (2d) 279 (Utah), Justice Henroid, speaking for the court says:

“It is true that our new rules should be ‘liberally construed’ to secure a ‘just * * * determination of every action,’ but they do not represent a one-way street down which but one litigant may travel. The rules allow locomotion in both directions by all interested travelers. They allow plaintiffs considerable latitude in pleading and proof, to the point where some people have expressed the opinion that careless legal craftsmanship has been invited rather than discouraged. Be that as it may, a defendant must be extended every reasonable opportunity to prepare his case and to meet an adversary’s claims. Also he must be protected against surprise and be assured equal opportunity and facility to present and prove counter contentions,—else unilateral justice and injustice would result sufficient to raise serious doubts as to constitutional due process guarantees.”

It does not satisfy the situation to say that plaintiffs should move for a more specific statement. The pleadings and admissions of defendants and the record before this court show conclusively that defendants cannot so amend their so-called counterclaims as to state a claim upon which relief can be granted.

POINT NO. 5

THE TRIAL COURT ERRED IN STRIKING FROM PLAINTIFFS’ REPLY TO THE COUNTERCLAIM OF THE DEFENDANT, UTAH LAKE FARMERS ASSOCIATION, ET AL.,

THE TWELFTH DEFENSE CONTAINED THEREIN.

Said defense reads:

"Twelfth Defense

"Said defendants, who purport to sue under said counterclaim on behalf of themselves and as members of a class, are endeavoring to bring numerous causes of action as representatives of a class against plaintiffs, and such causes of action are not authorized nor maintainable by defendants as members of a class under the Utah Rules of Civil Procedure and the character of the alleged rights sought to be enforced by said defendants are not such as can be enforced and adjudicated in a class action" (R. 176).

The counterclaim of Utah Lake Farmers Association, et al., purports to be brought by said unincorporated association and the individual counterclaimants named therein, on behalf of themselves and those similarly situated, to recover damages, which, however, are not specified, and it is prayed: "that the court, after determining and declaring the respective rights of the parties and the question of liability of the plaintiffs, reserve jurisdiction for the purpose of entertaining, and that it entertain and receive, the claims of all persons owning land abutting, or in the vicinity of, Utah Lake, for damages for flooding, inundating or saturation for which plaintiffs may be determined liable and after consideration through a master or directly, enter judgment against the plaintiffs for damages therefor;" (R. 106-107).

Said twelfth defense, which was stricken by the trial court, is based on the holding of this court that numerous

individual claims for damages, which are several, cannot be determined and adjudicated on the basis of class representation alone. *Nunnelly, et al. v. First Federal Building & Loan Association of Ogden, et al.*, 107 Utah 347, 154 P. (2d) 620, 107 Utah 379, 159 P. (2d) 141. Defendants have argued that said case is not controlling because it was decided prior to the effective date of the Utah Rules of Civil Procedure. We submit, however, that there is nothing contained in the Utah Rules of Civil Procedure which has extended the class action device so as to overrule the holding in the Nunnelly case. Representative suits have been long recognized by courts of equity even without the existence of express statutes or rules authorizing class actions. The principal purpose of the Utah rule (Rule 23), which was taken from the federal rule, was to permit representative suits in actions at law as well as in equity proceedings, provided the character of the right sought to be enforced otherwise met the prerequisites for bringing a class action.

POINT NO. 6

THE TRIAL COURT ERRED IN STRIKING FROM PLAINTIFFS' REPLIES THE ELEVENTH DEFENSE TO THE COUNTERCLAIM OF THE DEFENDANT, PROVO CITY, AND THE THIRTEENTH DEFENSE TO THE COUNTERCLAIM OF DEFENDANTS, UTAH LAKE FARMERS ASSOCIATION, ET AL.

Said defenses read:

“A determination of the issues involved in said counterclaim and an adjudication of the rights

sought to be enforced thereby cannot be determined and adjudicated without the joinder of additional indispensable parties, including, in addition to plaintiffs, all of the numerous persons entitled to use water from said irrigation system and the State Engineer of the State of Utah who is charged with the duty and responsibility of controlling and regulating the waters of said irrigation system under the laws of the State of Utah, which indispensable parties to said counterclaim, however, are neither necessary nor proper parties to the action instituted by plaintiffs" (R. 176-177, 186-187).

The administration and distribution of the waters of Utah Lake and Jordan River and the operation of the facilities installed for such purpose have been since the year 1925 and will continue to be, under the exclusive control of the state engineer through his duly appointed water commissioner. Defendants claim that their lands have been flowed in excess of the rights granted under Compromise Agreement because of the manner in which said facilities have been handled and operated. If there is any substance to such claim, which we deny, it is obvious that the state engineer and the water commissioner appointed by him to distribute the waters of said lake and river, are indispensable parties to any proceedings instituted to redress such alleged grievances. The storage of water in Utah Lake, which is provided for through the flowage rights granted under Compromise Agreement, is an integral part of the Utah Lake-Jordan River System. The water rights and priorities determined under the Morse Decree are predicated upon the storage rights created by Compromise Agreement. If proceedings be instituted to obtain relief against

the state engineer and his water commissioner for alleged wrongs in the administration of said water system and such proceedings involve said storage rights in Utah Lake, all persons having the right to the use of water under said system would be interested and necessary parties to such proceedings.

POINT NO. 7

THE TRIAL COURT ERRED IN STRIKING FROM PLAINTIFFS' REPLIES THE TWELFTH DEFENSE TO THE COUNTERCLAIM OF THE DEFENDANT, PROVO CITY, AND THE FOURTEENTH DEFENSE TO THE COUNTERCLAIM OF THE DEFENDANTS, UTAH LAKE FARMERS ASSOCIATION, ET AL.

Said defenses read as follows:

"Said counterclaim involves the determination of issues and attempts to invoke the jurisdiction of this court to adjudicate and enforce rights with respect to the storage, division and distribution of the waters of Utah Lake and the Jordan River, the adjudication and enforcement of which rights are within the exclusive jurisdiction of the District Court of Salt Lake County, State of Utah, in the case of Salt Lake City, a municipal corporation, et al., Plaintiffs, vs. Tamar Anderson, et al., Defendants, Case No. 57298, which is now pending in said District Court of Salt Lake County and in which case said court has ordered in accordance with the decision of the Supreme Court of Utah in such case, that said case proceed in conformity with the provisions of Chapter 4, Title 100, Utah Code Anno-

tated 1943, and amendments thereto (now found in Chapter 4, Title 73, Utah Code Annotated 1953), and that the state engineer be directed to perform the duties imposed upon him by the provisions of said statute and to comply therewith, to the end that there may be a determination and adjudication of all the rights to the use of the waters of Utah Lake in Utah County, Utah, and of the Jordan River in Utah and Salt Lake Counties, and its tributaries" (R. 177, 187).

During the pendency of the Tamar Anderson case in the District Court of Salt Lake County, which involves a general adjudication of rights to the use of the waters of Utah Lake, Jordan River and their tributaries, the water commissioner appointed by the state engineer to administer said waters is an "arm" of said court charged with the duty of distributing said waters to the various users entitled thereto in accordance with existing decrees. Should he refuse or neglect to discharge such duty, any injured party has recourse to the District Court of Salt Lake County as pointed out under the opinion rendered by this court in the Tamar Anderson case. Jurisdiction to restrain or prohibit alleged wrongs on the part of said water commissioner is exclusively within the jurisdiction of the District Court of Salt Lake County under whom he serves. In *Caldwell v. Erickson* (supra) a commissioner appointed by the District Court of Sevier County to distribute the waters of Sevier River and a water commissioner appointed by the state engineer for the same purpose, each claimed exclusive jurisdiction over the administration of said waters. This court said: "An inevitable consequence has been an intolerable condition of affairs rendering it imperatively

necessary that the rights of the contending parties should be adjudicated and determined by a competent tribunal.”

An equally intolerable situation would exist unless the District Court of Salt Lake County, before which a general adjudication is pending, is held to have exclusive jurisdiction over the matters involving the water commissioner's discharge of his legal duties in the administration and distribution of the waters in question during the pendency of said action. Suppose the District Court of Utah County issued an injunction as prayed for by defendants, which ordered plaintiffs to operate and handle the facilities for distributing the waters of said lake and river as directed by said court. Such an order would abrogate the jurisdiction and control over said facilities vested in said water commissioner under Chapter 5, Title 73, Utah Code Annotated 1953. Suppose, also, that the District Court of Salt Lake County concurrently entered an order restraining plaintiffs from interfering with said distribution works and directing that the water commissioner serving under said court continue his control and operation of the same in accordance with the power and authority vested in him by statute. The judicial chaos which would result from such conflicting orders is, of course, avoided under the salutary rule that when a court of competent jurisdiction acquires jurisdiction of the subject matter of a case, it retains such jurisdiction exclusively, subject only to appellate review, until a final determination of the matters pending before it.

POINT NO. 8

THE TRIAL COURT ERRED IN STRIKING
CERTAIN PORTIONS FROM PLAINTIFFS'
ANSWER TO DEFENDANTS' AFFIDAVIT
FOR PRELIMINARY INJUNCTION.

The trial court ordered stricken from said answer a portion thereof which pleads and sets forth the order of the District Court of Salt Lake County entered February 13, 1914, directing the construction of the facilities in the Jordan River at the Jordan Narrows for measuring, diverting and distributing the waters of said river and Utah Lake, and the orders entered in the Tamar Anderson case decreeing a general adjudication of rights to the use of said waters and authorizing the appointment of water commissioners to administer and distribute the same in accordance with existing decrees pending such general adjudication. The materiality and relevancy of said orders has been covered in the points hereinbefore argued, and in order not to be repetitious, we submit the same in support of this point.

CONCLUSION

Defendants by their counterclaims request the court to issue an injunction against plaintiffs relating to the operation of the diversion works and measuring devices in the Jordan River at the Jordan Narrows and to hold plaintiffs liable for damages claimed to have resulted from the manner in which such facilities have been operated. The indisputable facts in the record and of which this court takes judicial notice show, however, that: Said facilities were installed in the year 1914 under an order of the District Court of Salt Lake County for the purpose of diverting and distributing the waters of Utah Lake and Jordan River in accordance with existing court decrees; said facilities were under the control and management of a commissioner appointed by said District Court from the time of their installation until the year 1925 when he was superseded by a water commissioner appointed by the state engineer as provided by statute; thereafter the state engineer through his duly appointed water commissioners has continuously operated and exercised exclusive control over said facilities; and plaintiffs have never handled, controlled or operated the same since their construction.

Defendants also assert that the perpetual easement granted to plaintiffs under Compromise Agreement in the year 1885 for the flowage of the lands bordering Utah Lake is limited and restricted to waters draining into said lake which have the same source as existed at the time of said agreement. This contention is based solely upon what ^{DEF-}plaintiffs ^{ENDANTS} conceive and allege to have been contemplated by the parties. Such interpretation of Compromise Agreement is

contrary to its expressed terms, the construction judicially placed thereon in the Colladge Case and the practical interpretation adopted by the parties thereto for more than half a century.

Finally, defendants claim that the channel of the Jordan River has been adopted by plaintiffs as a private channel for the transportation of their irrigation water and that, therefore, plaintiffs were charged with the duty of removing certain obstructions in said river resulting from landslides along the same occurring in the year 1952 when unprecedented flood conditions existed in Salt Lake and Utah Counties. The premise upon which defendants would have the court impose said duty and liability for neglect thereof is not supported by the facts of which this court takes judicial notice: The Jordan River is a natural channel, which, subject to the control of the state engineer, has been used for many years by numerous appropriators, other than plaintiffs, to convey the waters of said lake for various beneficial uses in Salt Lake County; and the authority to remove such alleged obstructions from the channel of said river is vested by statute in the board of county commissioners of the county within which said channel is located.

The trial court erred in not dismissing defendants' counterclaims and in striking certain portions from plaintiffs' replies and plaintiffs' answer to defendants' affidavit and petition for preliminary injunction. The controlling facts in this case, concerning which there can be no substantial controversy, establish as a matter of law that defendants are not entitled to any relief against plaintiffs

under said counterclaims. The rule providing for an intermediate appeal is especially designed to afford the relief which we request, thereby preventing protracted, expensive and unnecessary litigation.

Respectfully submitted,

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